IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-75,229-02

EX PARTE CHRISTOPHER CHUBASCO WILKINS, Applicant

ON APPLICATION FOR POST-CONVICTION WRIT OF HABEAS CORPUS AND MOTION TO STAY THE EXECUTION IN CAUSE NO. C-297-010957-1002038-B IN THE 297TH DISTRICT COURT TARRANT COUNTY

ALCALA, J., filed a dissenting opinion.

DISSENTING OPINION

I respectfully dissent from this Court's order that dismisses the subsequent application for a writ of habeas corpus and denies the motion for a stay of execution filed by Christopher Chubasco Wilkins, applicant. I would grant the motion to stay and remand the habeas application to the habeas court for further proceedings on applicant's claims. Today, this Court determines that, because applicant's claims raised in the instant application could have been, but were not, raised in his initial writ application, those claims are now procedurally barred pursuant to Section 5 of Article 11.071. *See* TEX. CODE CRIM. PROC. art. 11.071, § 5(a). I disagree with that determination because it appears to me that applicant's instant

claims should not be dismissed under Section 5. I conclude that the Section 5 procedural bar is likely inapplicable because applicant's purported initial habeas application was a nullity due to appointed habeas counsel's failure to present any claims that were not procedurally barred or were cognizable in a habeas application. *See, e.g., Ex parte Medina,* 361 S.W.3d 633 (Tex. Crim. App. 2011) (per curiam); *Ex parte Kerr,* 64 S.W.3d 414, 415 (Tex. Crim. App. 2002). Alternatively, I would take this opportunity to overrule this Court's holding in *Ex parte Graves,* 70 S.W.3d 103 (Tex. Crim. App. 2002). I would hold that, by filing an initial habeas application that alleged only claims that were either procedurally barred or were not cognizable, applicant's initial habeas counsel appears to have wholly failed to act as counsel for applicant, and, therefore, applicant has never had his "one bite" at the habeas corpus apple. Applicant, thus, is entitled to new initial habeas counsel and the procedural bar on subsequent writs is inapplicable.

I. Further Proceedings Are Warranted Under *Ex parte Medina* and *Ex parte Kerr*

The Court's order dismissing the instant application does so on the basis that it is a subsequent filing and, therefore, it concludes that consideration of the application on the merits is statutorily prohibited unless the claims can satisfy one of several limited exceptions. *See* TEX. CODE CRIM. PROC. art. 11.071, § 5(a). Applicant contends, however, that the statutory bar on subsequent writs does not apply to his case because his initial habeas application was rendered a nullity due to initial habeas counsel's failure to plead specific facts which, if true, might call for relief. In support of this assertion, applicant cites to this

Court's prior opinions in *Medina,* 361 S.W.3d at 642, and *Kerr*, 64 S.W.3d at 419. As discussed further below, I agree with applicant's contention that the underlying reasoning of *Medina* and *Kerr* appears to apply to initial habeas counsel's failure to raise even one cognizable claim, thus rendering the initial application a nullity so as to warrant further habeas proceedings in this case.

A. Applicable Law: *Medina* and *Kerr*

In *Medina*, this Court held that a document entitled "Application for Writ of Habeas Corpus" in a death-penalty case was not, in fact, a "proper application" for a writ of habeas corpus under Article 11.071 because it "did not set out specific facts or contain any exhibits, affidavits, or a memorandum of law that alleged any specific facts." *Medina*, 361 S.W.3d at 635. The habeas counsel in *Medina* had filed a document that presented ten claims for post-conviction relief alleging ineffective assistance of counsel, but the entire application was only four pages long and "merely state[d] factual and legal conclusions." *Id.* This Court determined that habeas counsel had intentionally filed a deficient pleading as a means of forcing this Court to address its pleading requirements for Article 11.071 applications. *Id.* In ultimately concluding that the document filed by habeas counsel would not constitute Medina's "one bite" at the habeas corpus apple, this Court reasoned that the document had failed to "allege specific facts which, if proven true, would entitle applicant to relief." *Id.* at 636. In *Medina*, this Court concluded that Medina

> had not had his one full and fair opportunity to present his constitutional or jurisdictional claims in accordance with the procedures of Article 11.071. Not

> full because he is entitled to one bite at the apple, i.e., one application, and the document filed was not a proper writ application. Not fair because applicant's opportunity, through no fault of his own, was intentionally subverted by his habeas counsel.

Id. at 642 (quotation marks omitted). The proper remedy under those circumstances was to appoint new habeas counsel and permit that new counsel to file what would be considered Medina's initial habeas application.

In *Kerr*, this Court held that a writ application in a death-penalty case that did not "challenge the validity of the underlying judgment" was likewise not a proper writ application as defined by Article 11.071. 64 S.W.3d at 419. In *Kerr*, Kerr's initial habeas counsel had filed a document styled as an application for a writ of habeas corpus, but the sole claim presented pertained only to an attack on the constitutionality of the capital habeas corpus statute itself, rather than presenting any claims attacking the validity of Kerr's conviction or sentence. This Court held that the initial application filed by Kerr's habeas counsel was not, in fact, a "true application for a writ of habeas corpus" under Article 11.071 because it "raised no constitutional or jurisdictional claims concerning the fundamental fairness of the underlying trial or the accuracy of the verdict." *Id*. at 416. Instead, the only claim presented was a "derivative claim" that would not "entitle a death row inmate to any 'relief from a judgment imposing a penalty of death.'" *Id*. This Court stated,

> To constitute a document worthy of the title "writ application" filed pursuant to article 11.071, the writ must seek "relief from a judgment imposing a penalty of death." A death penalty "writ" that does not challenge the validity of the underlying judgment and which, even if meritorious, would not result

> in immediate relief from his capital-murder conviction or death sentence, is not an "initial application" for purposes of Article 11.071, § 5.

Id. In determining whether Kerr's later-filed writ application should be subject to the statutory bar on successive habeas applications, this Court held that the more recent application should not be procedurally barred because it was "the first writ application that Mr. Kerr has filed which comports with the requirements of article 11.071 in that it seeks relief from a judgment imposing a penalty of death." *Id.* at 418. In other words, this Court determined that the proper remedy for initial habeas counsel's "innocent mistake" in failing to present any viable post-conviction claims was to treat Kerr's subsequent filing as his initial habeas application. *Id.* at 420. As in *Medina*, the reasoning underlying this Court's conclusion in *Kerr* was its observation that the "entire statute is built upon the premise that a death row inmate does have one full and fair opportunity to present his constitutional or jurisdictional claims in accordance with the procedures of the statute," but Kerr "ha[d] not yet had that one full and fair opportunity." *Id*. at 419.

B. Application of Reasoning of *Medina* and *Kerr* Suggests that Applicant is Entitled to Further Habeas Proceedings

Although the habeas applications in *Medina* and *Kerr* were more skeletal than his initial writ application, applicant nonetheless contends that the underlying reasoning of those cases applies with equal force to his application, given the failure of his initial habeas counsel to present any viable basis for post-conviction relief. I generally agree with that contention. In applicant's initial post-conviction application, his appointed habeas attorney

presented eighteen claims for relief that, at first blush, may appear to assert possibly viable claims for relief. But a closer examination reveals that initial habeas counsel presented only claims that either were procedurally barred or were not cognizable on habeas review, and thus, as in *Medina* and *Kerr*, the initial application failed to give applicant his one bite at the habeas corpus apple.

The habeas court's findings of fact and conclusions of law were adopted by this Court as our findings, and these findings determined that each of applicant's claims in his initial habeas application either were not cognizable or were procedurally barred. In particular, with respect to applicant's first four claims challenging the lethal-injection drug protocol used to carry out executions in Texas, the habeas court correctly noted that this type of claim has been held to be non-cognizable in an Article 11.071 writ proceeding.[1] *See Ex parte Alba*, 256 S.W.3d 682, 684 (Tex. Crim. App. 2008) ("A death-penalty writ application that does not challenge the validity of the underlying judgment and which, even if meritorious, would

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[1] Applicant's first four claims in his initial application were:

1. The use of pancuronium bromide in the chemical "mix" used to execute Texas prisoners violates the Eighth and Fourteenth Amendments to the United States Constitution.

2. The use of pancuronium bromide in the chemical "mix" used to execute Texas prisoners violates Article I, §§ 13 and 19 of the Texas Constitution.

3. Applicant's right to a writ of habeas corpus has been effectively and impermissibly suspended in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

4. Applicant's right to a writ of habeas corpus has been effectively and impermissibly suspended in violation of Article I, §§ 12 and 19 of the Texas Constitution.

not result in immediate relief from a capital-murder conviction or death sentence, is not a proper application for purposes of Article 11.071."). Applying this well-settled law, the habeas court stated, "Applicant's challenge to the use of pancuronium bromide in the chemical mix used to execute Texas prisoners is not cognizable in this habeas proceeding. . . . Consideration of the merits of applicant's claim[s] at this time would result in an impermissible declaratory judgment and would not result in relief for applicant."[2] The habeas court also summarily rejected applicant's suggestion that, to the extent that his drug-protocol claims would be deemed non-cognizable on habeas review, such a conclusion would constitute an impermissible suspension of the writ in violation of the state and federal constitutions. With respect to this matter, the habeas court observed that this Court has rejected such challenges previously.[3]

Applicant's remaining claims five through eighteen were rejected by the habeas court as procedurally barred,[4] either because they had been previously raised and rejected on direct

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[2] Habeas Court's Findings of Fact and Conclusions of Law, at 2 (citing *Ex parte Alba*, 256 S.W.3d 682, 684 (Tex. Crim. App. 2008); *Gallo v. State*, 239 S.W.3d 757, 780 (Tex. Crim. App. 2007)).

[3] *Id.* at 3 (citing *Ex parte Geiken*, 28 S.W.3d 553, 557 (Tex. Crim. App. 2000) (holding that determination that claim was not cognizable did not unlawfully suspend the writ)).

[4] Applicant's claims five through eighteen in his initial application were as follows:

5. Applicant's rights under the Fifth and Fourteenth Amendments to the United States Constitution were denied by the failure of Texas law to require grand juries to pass on death penalty special issues.

6. Applicant's rights under Article I, §§ 10 and 19 of the Texas Constitution were denied by the failure of Texas law to require grand juries to pass on death penalty special issues.

7. Applicant's rights under the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution were denied him by that provision of Article 37.071, § 2, TEX. CODE CRIM. PROC., which prohibits informing jurors of the effect of a failure to agree on issues.

8. Applicant's rights under Article I, §§ 13 and 19 of the Texas Constitution were denied him by that provision of Article 37.071, § 2, TEX. CODE CRIM. PROC., which prohibits informing jurors of the effect of a failure to agree on issues.

9. The Texas death penalty scheme is unconstitutional in that the so-called "10-12" rule embodied in Article 37.071 TEX. CODE CRIM. PROC. violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

10. The Texas death penalty scheme is unconstitutional in that the so-called "10-12" rule embodied in Article 37.071 TEX. CODE CRIM. PROC. violates Article I, §§ 10, 13, 15, and 19 of the Texas Constitution.

11. The State's introduction of a tattoo depicting Adolf Hitler was so unfairly prejudicial as to deprive applicant of his right to a fair and impartial trial under the Fifth and Fourteenth Amendments to the United States Constitution.

12. The state's introduction of a tattoo depicting Adolf Hitler was so unfairly prejudicial as to deprive applicant of his right to a fair and impartial trial under Article I, § 10 of the Texas Constitution.

13. Applicant was denied his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution in that punishment special issue number two (mitigation) fails to impose the burden of proof on the state.

14. Applicant was denied his rights under Article I, §§ 10 and 19 of the Texas Constitution in that punishment special issue number two (mitigation) fails to impose the burden of proof on the state.

15. The mitigation special issue set out in Article 37.071, TEX. CODE CRIM. PROC. is unconstitutionally vague and indefinite, in violation of applicant's rights under the Fourteenth Amendment to the United States Constitution.

16. The mitigation special issue set out in Article 37.071, TEX. CODE CRIM. PROC. is unconstitutionally vague and indefinite, in violation of applicant's rights under Article I, § 19 of the Texas Constitution.

17. The trial court erred in failing to instruct the jurors that a "yes" answer to the future danger special issue was required unless the jurors determined that the aggravating evidence outweighed

appeal or because they could have been raised on direct appeal but were not litigated at that procedural juncture.[5] With respect to each of these claims, the habeas court stated, among other things, either that applicant's claim for relief was "raised and rejected on direct appeal and will not be reconsidered in this habeas-corpus proceeding," or that applicant "forfeited his claim" by "failing to raise it on direct appeal" when he had an available opportunity to do so.[6]

Although the purported initial habeas applications in *Medina* and *Kerr* were more skeletal than the purported initial habeas application here, I generally agree with applicant's contention that the underlying rationale of those cases would require the same holding here so that applicant should have counsel appointed so that counsel may file a proper initial

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the mitigating evidence.

18. The trial court erred in failing to hold Texas' death penalty stage unconstitutional on grounds that it fails to require the jury to consider mitigation in answering special issue two.

[5] *Id.* at 4-14 (citing *Ex parte Torres*, 943 S.W.2d 469, 475 (Tex. Crim. App. 1997) ("Generally, a claim which was previously raised and rejected on direct appeal is not cognizable on habeas corpus."); *Ex parte Townsend*, 137 S.W.3d 79, 81 (Tex. Crim. App. 2004) ("Even a constitutional claim is forfeited if the applicant had the opportunity to raise the issue on appeal.").

[6] The habeas court's findings of fact and conclusions of law also appear, in the alternative, to reject many of applicant's assertions on the merits, but the pertinent issue here is whether applicant's initial habeas attorney filed an application that had any possible chance of resulting in habeas relief under the pleadings that were asserted. Furthermore, this Court's subsequent order adopting the habeas court's findings and conclusions as a basis for denying relief in this case does not specify whether it found applicant's claims procedurally barred, non-cognizable, or, alternatively, meritless. Regardless of whether the claims were also worthless on their merits, this Court denied relief on applicant's initial writ application on the basis that all of the claims presented therein were either non-cognizable on habeas review or were procedurally barred under this Court's longstanding precedent that prohibits review of claims that were considered and rejected on direct appeal or, alternatively, should have been raised on direct appeal.

habeas application. As discussed above, applicant's initial habeas counsel did not present a single cognizable, non-procedurally barred claim for the habeas court or for this Court to consider as a possible basis for granting applicant post-conviction relief from his conviction or sentence. In fact, the first four of applicant's claims regarding the execution drug protocol were all non-cognizable claims that did not attack the validity of his judgment or sentence, and the remaining fourteen claims were all procedurally barred because they were record-based claims that either had been litigated or should have been litigated on direct appeal. Though many in number, none of the eighteen claims in the initial writ application had a viable chance of providing habeas relief to applicant. Applicant's initial habeas application was a non-application without even an arguable basis for relief. As in *Medina* and *Kerr*, because initial habeas counsel failed to allege any controverted facts that, if true, might entitle applicant to relief, there was nothing for the habeas court to resolve and, thus, no legitimate basis presented upon which applicant might possibly have obtained relief from his conviction or sentence. Although, unlike in *Medina*, here there is no evidence of an intentional failure to file an adequate writ application by initial habeas counsel, I cannot see why counsel's bad intentions should determine whether an applicant is permitted a meaningful opportunity to litigate his post-conviction claims. Although this Court in *Medina* drew the line at intentional incompetence by habeas counsel, I can see no basis for limiting the rule of that case in such a manner when an applicant such as the present one, like the applicant in *Medina*, has also lost his full and fair bite at the apple.

II. *Ex Parte Graves* Should Be Overruled

In addition to urging this Court to permit him to litigate the merits of his instant claims under the rule of *Medina* and *Kerr*, applicant contends that his case presents this Court with an opportunity to overrule its holding in *Ex parte Graves*, in which it had previously determined that, although an Article 11.071 applicant is entitled to post-conviction counsel who is competent as of the time of his appointment, he is not entitled to "effective assistance of that counsel in the particular case that can form the basis of a subsequent writ." *Graves*, 70 S.W.3d at 117. I have previously urged this Court to revisit its holding in *Graves* and determine that Article 11.071 habeas applicants are entitled to competent representation by their appointed post-conviction counsel. *See Ex parte Buck*, 418 S.W.3d 98, 99 (Tex. Crim. App. 2013) (Alcala, J., dissenting). I have further suggested that incompetence by appointed counsel in an initial Article 11.071 proceeding should serve as a basis for overcoming the statutory bar on subsequent writs when that incompetence leads to the forfeiture of a substantial claim for post-conviction habeas relief. *See id.* (suggesting that, "when an applicant can demonstrate that initial habeas counsel's performance fell below the minimum standards for representation set forth in Article 11.071, and when an applicant can demonstrate that, as a result of counsel's incompetence, a substantial claim for relief was forfeited, this Court may properly exercise its habeas jurisdiction to consider the merits of the underlying claim"); *see also Ex parte Ruiz*, __S.W.3d__, 2016 WL 6609721, at *22 (Tex. Crim. App. Nov. 9, 2016) (Alcala, J., dissenting). It appears that applicant's initial habeas

counsel's performance fell below the minimum standards for representation set forth in the capital habeas statute because he filed an application that presented no possible arguable basis for obtaining habeas relief. I would take this opportunity to overrule *Graves* and permit applicant to pursue his claim that initial habeas counsel was ineffective, and, if so, to litigate his instant claims on the merits.

III. Conclusion

At this juncture, I would grant the motion to stay the execution and I would remand the instant habeas application to the habeas court for further proceedings. I would extend the reasoning of *Kerr* and *Medina* to the present situation and hold that applicant's initial habeas application was a nullity due to initial habeas counsel's failure to file a proper writ application presenting any cognizable, non-procedurally barred claims. Alternatively, I would revisit this Court's holding in *Graves* and hold that initial habeas counsel wholly failed to perform as counsel for applicant in the initial Article 11.071 proceeding. I would require the habeas court to appoint counsel for applicant, with such counsel then being permitted to file what should be characterized as an initial habeas writ. For these reasons, I respectfully dissent from this Court's dismissal of the instant application and its denial of the motion for a stay of execution.

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